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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Trevor Reid, et al.,

10 Plaintiffs,

11 v.

12 United States Department of Interior, et al.,

13 Defendants.  
14

No. CV-22-00068-PHX-SMB

**ORDER**

15 Pending before the Court is Defendant United States of America's ("Government")  
16 Partial Motion to Dismiss. (Doc. 33.) Plaintiffs Trevor Reid and Crystale Reason filed a  
17 Response (Doc. 36), and the Government filed a Reply (Doc. 38). The Court exercises its  
18 discretion to resolve this Motion without oral argument. *See* LRCiv 7.2(f) ("The Court  
19 may decide motions without oral argument."). After reviewing the parties' briefing and  
20 the relevant law, the Court will grant the Government's Motion for the following reasons.

21 **I. BACKGROUND**

22 This case resulted from an interaction Plaintiffs had with park rangers while  
23 camping. (Doc. 28 at 3.) In August 2017, Plaintiffs had a campsite reserved near Triangle,  
24 Virginia for their family and dog. (*Id.*) On the evening of August 19, a National Park  
25 Service ranger approached Plaintiffs' campsite and asked if anyone was there. (*Id.* at 5.)  
26 No one responded. (*Id.*) The ranger returned later that night, again asking if anyone was  
27 there. (*Id.*) Plaintiffs allege the ranger shouted, knocked on their car window, and shined  
28 a bright flashlight in their eyes. (*Id.*) The ranger instructed Plaintiffs to move their car and

1 identify themselves. (*Id.* at 6.) Plaintiffs allege the ranger detained them, frisked Plaintiff  
 2 Trevor Reid for weapons, and looked inside their tent without permission. (*Id.* at 7–8.)

3 Plaintiffs now bring this lawsuit, alleging many claims under the Federal Tort Claim  
 4 Act (“FTCA”) and Virginia state law. (*Id.* at 9–12.) The Government moves to dismiss  
 5 all claims except the FTCA claims that Plaintiffs had previously asserted in the  
 6 administrative claims process. (Doc. 33 at 11.)

## 7 II. LEGAL STANDARD

8 Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a  
 9 claim for lack of subject matter jurisdiction. “Federal courts are courts of limited  
 10 jurisdiction” and may only hear cases as authorized by the Constitution or Congress.  
 11 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “A Rule 12(b)(1)  
 12 jurisdictional attack may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d  
 13 1035, 1039 (9th Cir. 2004). A facial attack “asserts that the allegations contained in a  
 14 complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* In a facial  
 15 attack, the court “[A]ccept[s] the plaintiff’s allegations as true” and “determines whether  
 16 the allegations are sufficient as a legal matter to invoke the court’s jurisdiction,” “drawing  
 17 all reasonable inferences in the plaintiff’s favor.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121  
 18 (9th Cir. 2014). “A ‘factual’ attack, by contrast, contests the truth of the plaintiff’s factual  
 19 allegations, usually by introducing evidence outside the pleadings.” *Id.* In a facial attack,  
 20 our inquiry is confined to the allegations in the complaint, while a factual attack permits  
 21 the court to look beyond the complaint. *Savage v. Glendale Union High Sch.*, 343 F.3d  
 22 1036, 1039 n.2 (9th Cir. 2004). The party asserting jurisdiction bears the burden of proof.  
 23 *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990). When the  
 24 plaintiff does not meet the burden of showing the Court has subject matter jurisdiction, the  
 25 Court must dismiss the action. *See* Fed. R. Civ. P. 12(h)(3). “Because subject-matter  
 26 jurisdiction involves a court’s power to hear a case, it can never be forfeited or waived.”  
 27 *United States v. Cotton*, 535 U.S. 625, 630 (2002).

### 1           **III. ANALYSIS**

2           The Government argues this Court lacks jurisdiction over: (1) all claims against  
3 unnamed defendants; (2) claims not brought during the administrative claims process; and  
4 (3) Plaintiffs’ claims for libel, civil conspiracy, fraud, and breach of contract/constructive  
5 and unlawful eviction. (Doc. 33 at 1.) The Court will address each in turn.

#### 6           **A. Unnamed Defendants**

7           The Government asserts Plaintiffs cannot maintain FTCA claims against unnamed  
8 defendants. (Doc. 33 at 3.) “The United States is the only proper defendant in an FTCA  
9 action.” *Lance v. United States*, 70 F.3d 1093, 1095 (9th Cir. 1995) (holding the district  
10 court properly dismissed the plaintiff’s “action to the extent [the] complaint named Does 1  
11 through 20 as additional defendants”). Here, Plaintiffs name as defendants the Government  
12 and “one or more unknown named agents of the United States, called by the fictitious  
13 names John Doe or Jane Doe, whose identities are not yet known.” (Doc. 28 at 1, 10–11.)  
14 Plaintiffs respond that some of their claims against the unnamed Defendants are not  
15 asserted under the FTCA. (Doc. 36 at 3.) But similar to the Court’s analysis addressed  
16 below, *see infra* Sec. III(B), Plaintiffs did not raise their trespassing claims against  
17 unnamed defendants in the administrative action. (*See* Doc. 33-2 at 13–14 (naming only  
18 Doyle and Ballam as trespassers in the Administrative Complaint.)) The Court will  
19 therefore grant the Government’s Motion as to Plaintiffs’ FTCA claims concerning these  
20 fictitious, unnamed Defendants.

#### 21           **B. FTCA Claims**

22           The Government contends this Court lacks subject matter jurisdiction over any  
23 FTCA claims that Plaintiffs failed to raise administratively. (Doc. 33 at 4.) Plaintiffs  
24 respond that they provided adequate notice of their claims during their pursuit of  
25 administrative relief. (Doc. 36 at 3–4.) As a jurisdictional requirement, the FTCA requires  
26 any claims against the Government to first be brought before the appropriate federal  
27 agency. *See* 28 U.S.C. § 2675(a). “Because the requirement is jurisdictional, it must be  
28 strictly adhered to [because] the FTCA waives sovereign immunity.” *Brady v. United*

1 *States*, 211 F.3d 499, 502 (9th Cir. 2000) (cleaned up).

2 In its Motion, the Government provided a table of Plaintiffs' claims from the  
3 Amended Complaint and whether Plaintiffs raised those claims administratively. (*See* Doc.  
4 33 at 4–5.) The Court agrees that many of Plaintiffs' claims were not raised to the  
5 Department of Interior, and thus the Court lacks jurisdiction to adjudicate them. The Court  
6 will therefore dismiss the following claims: (1) negligent hiring, supervision, and training  
7 of Ballum, Sirk-Fear, and Gosset; (2) battery by Ballum; (3) intentional infliction of  
8 emotional distress by Ballum; (4) negligent infliction of emotional distress by Doyle and  
9 Ballum; (5) trespass to chattels by Ballum; (6) religious, racial, or ethnic harassment; and  
10 (7) insulting words. (*Id.*; *see also* Docs. 33-2 at 10–14; 33-3 at 2, 6.) Plaintiffs assert that  
11 the Administrative Complaint and Request for Reconsideration included “[f]acts sufficient  
12 to anticipate Plaintiff’s claims in this action.” (Doc. 36 at 3.) The Court rejects this  
13 assertion, as the Court’s jurisdiction is limited to those claims already adjudicated by the  
14 Department of Interior. *See* 28 U.S.C. § 2675(a) (“An action shall not be instituted upon a  
15 claim against the United States for money damages . . . unless the claimant shall have first  
16 presented the claim to the appropriate Federal agency.”).

17 The Government also contends the Court lacks subject matter jurisdiction over  
18 Plaintiffs' claims for libel, civil conspiracy, fraud, and breach of contract/constructive  
19 eviction. (Doc. 33 at 6.) “The provisions of this chapter and section 1346(b) of this title  
20 shall not apply to . . . libel, slander, misrepresentation, deceit, or interference with contract  
21 rights.” 28 U.S.C. § 2680(h). The Court first notes that Plaintiffs did not raise fraud or  
22 civil conspiracy claims in their Administrative Complaint, meaning this Court lacks  
23 jurisdiction for the reasons stated above. *See* 23 U.S.C. § 2675(a). Even so, Plaintiffs’  
24 libel claim is barred by the FTCA’s libel and slander exception and their claims for fraud,  
25 conspiracy, and that Doyle allegedly submitted a false or misleading statement are similarly  
26 barred. *See* 28 U.S.C. 2680(h); *see also Poole v. McHugh*, No. 12-cv-8047-PCT-JAT,  
27 2012 WL 3257654, at \*1 (D. Ariz. Aug. 8, 2012) (concluding “Plaintiff’s claims for fraud  
28 and conspiracy are barred because the United States has not waived its sovereign immunity

1 for these intentional tort claims.”).

2 Plaintiffs’ breach of contract claim stems from “the ranger’s and agents actions and  
3 omissions” allegedly interfering with Plaintiffs’ campsite reservation. (*See* Docs. 28 at 11–  
4 12 ¶ 72(c); 33-2 at 4 n.1, 13–14 ¶ 19.) Such a claim for interference with a contract, or a  
5 general claim for breach of contract, is not available under the FTCA. *See* 28 U.S.C.  
6 § 2680(h); *see also* *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1120 (9th Cir.  
7 2019) (contrasting the district court’s jurisdiction over FTCA claims “arising out of the  
8 negligent or wrongful conduct of any federal employee acting within the scope of the  
9 employee’s employment” with the Court of Federal Claim’s exclusive jurisdiction to hear  
10 actions “sounding in contract”).

11 The Court will therefore dismiss the aforementioned claims pursuant to Rule  
12 12(b)(1).

### 13 **C. Constitutional Claims**

14 The Government asserts that Plaintiffs’ federal and state constitutional claims are  
15 improperly before this Court. The Government contends Plaintiffs raise *de facto* *Bivens*  
16 claims—claims for money damages against federal agents or employees, acting in their  
17 individual and not official capacities, for violations of constitutional rights. *See Bivens v.*  
18 *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *see also*  
19 *Watson v. Evans*, No. 13-cv-3035-EFM, 2014 WL 7246800, at \*3 (D. Kan. Dec. 17, 2014)  
20 (“*Bivens* claims are not actionable against the United States, federal agencies, or public  
21 officials acting in their official capacities.” (citing *F.D.I.C. v. Meyer*, 510 U.S. 471, 477–  
22 78 (1994))). The original Complaint stated this action was “brought pursuant to the Fourth,  
23 Fifth, and Sixth Amendments to the United States Constitution; pursuant to the cause of  
24 action recognized in *Bivens v. Six Unknown Named Agents*.” (Doc. 1 at 3.) The Amended  
25 Complaint includes claims that Plaintiffs’ First and Eighth Amendment rights were also  
26 violated. (Doc. 28 at 11 ¶ 70.) Plaintiffs respond that “[i]ndependent of *Bivens*  
27 jurisprudence plaintiffs will endeavor to argue for extending, modifying, or reversing  
28 existing law or for establishing new law in that constitutional harm is itself damage caused

1 by the tortious conduct under the FTCA, rather than a cause of action itself.” (Doc. 36 at  
2 5.)

3 The Court construes Plaintiffs’ constitutional claims as impermissible constitutional  
4 torts, not *Bivens* claims.<sup>1</sup> As noted in the Government’s Motion, the Amended Complaint  
5 made no mention of *Bivens* and instead asserts this Court has jurisdiction under federal  
6 question jurisdiction via the FTCA—and that this Court can exercise supplemental  
7 jurisdiction to decide Plaintiffs’ state law claims. (See Docs. 33 at 6–7; 1 at 3 ¶ 10; 28 at  
8 2–3 ¶ 8.) The Supreme Court has held that constitutional torts are not cognizable under  
9 the FTCA. See *Meyer*, 510 U.S. at 477–78 (federal law cannot be the “source of substantive  
10 liability under the FTCA”). Plaintiffs’ characterization of their alleged harm was the  
11 “deprivation of Plaintiffs rights guaranteed by the Constitution of the United States,  
12 specifically the First, Fourth, Fifth, Sixth, and Eighth Amendments.” (Doc. 28 at 11 ¶ 70.)  
13 Thus, Plaintiffs’ claims are based entirely on alleged constitutional violations, and are not  
14 really tort allegations. In contrast, *Bivens* claims must allege misconduct by individual  
15 defendants that amounts to constitutional violations. See *Watson*, 2014 WL 7246800, at  
16 \*3. While Plaintiffs allege the harm was committed by the Government’s agents, they  
17 made no allegations made against specific individuals. (See Doc. 28 at 11 ¶ 70.) The Court  
18 will therefore dismiss Plaintiffs’ claims made under the United States Constitution.

19 The Government argues Plaintiffs’ claims under the Virginia Constitution must also  
20 be dismissed because the United States has not waived its sovereign immunity. (Doc. 33  
21 at 7.) The Court agrees. “A waiver of sovereign immunity ‘cannot be implied but must be  
22 unequivocally expressed.’” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting  
23 *United States v. King*, 395 U.S. 1, 4 (1969)). Plaintiffs bear the burden to demonstrate a  
24 waiver of sovereign immunity. *Cunningham v. United States*, 786 F.2d 1445, 1446 (9th  
25 Cir. 1986). The Amended Complaint does not identify any basis for the Court to find that  
26 the Government<sup>2</sup> has consented to liability for violations of the Virginia Constitution.

27 <sup>1</sup> Even if the Court were to construe Plaintiffs’ constitutional claims as *Bivens* claims, the  
28 Court would be required to dismiss any *Bivens* claims because Plaintiffs explicitly sue the  
unnamed Doe Defendants in their official capacities. (Doc. 28 at 2 ¶ 7.)

<sup>2</sup> The Court again notes that the Amended Complaint makes allegations against unnamed

1 Because the waiver of sovereign immunity is a prerequisite for jurisdiction, Plaintiffs have  
 2 not established that this Court has jurisdiction over its state constitutional law claims. The  
 3 Court will therefore dismiss Plaintiffs' claims made under the Virginia Constitution.

#### 4 **IV. LEAVE TO AMEND**

5 "[A] district court should grant leave to amend even if no request to amend the  
 6 pleading was made, unless it determines that the pleading could not possibly be cured by  
 7 the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (cleaned  
 8 up). The Court finds it would be futile to grant leave to amend, as the FTCA does not  
 9 permit Plaintiffs to assert claims: (1) against any defendant other than the United States—  
 10 such as the unnamed defendants; (2) not raised in the administrative complaint; (3) as  
 11 described in Section III(B); and (4) under the United States or Virginia Constitutions.

#### 12 **V. CONCLUSION**

13 Accordingly,

14 **IT IS ORDERED** granting the Government's Partial Motion to Dismiss. (Doc.  
 15 33.)

16 **IT IS FURTHER ORDERED** dismissing the following of Plaintiffs' claims **with**  
 17 **prejudice**: (1) Submission of a false or misleading statement; (2) negligent hiring,  
 18 supervision, and training of Ballum, Sirk-Fear, Gosset, John Doe #1, and John Doe #2; (3)  
 19 deprivation of rights under the United States Constitution; (4) deprivation of rights under  
 20 the Virginia Constitution; (5) battery by Ballum; (6) intentional infliction of emotional  
 21 distress by Ballum; (7) negligent infliction of emotional distress by Doyle and Ballum; (8)  
 22 libel by Doyle; (9) trespass to chattels by Ballum; (10) religious, racial, or ethnic  
 23 harassment; (11) insulting words; (12) breach of contract/constructive eviction; (13) civil  
 24 conspiracy; and (14) fraud.

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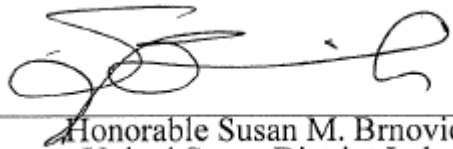
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28 \_\_\_\_\_  
 Doe Defendants "in their official capacities." (Doc. 28 at 2 ¶ 7.)

1           **IT IS FURTHER ORDERED** that the Government must file its answer to the  
2 remaining claims within twenty (20) days of the date of this order.

3           Dated this 19th day of May, 2023.

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Honorable Susan M. Brnovich  
United States District Judge